Comments

An Analysis of the Judicial Interpretation of the 1974 Ohio Speedy Trial Act: The First Five Years

The right to a speedy trial in a criminal prosecution is guaranteed by the sixth amendment[1] and made applicable to the states by the fourteenth amendment.[2] The United States Supreme Court has stated that the guarantee of a speedy trial protects "at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation, and [3] to limit the possibilities that long delay will impair the ability of the accused to defend himself.' "[3] The right to a speedy trial is unique in a number of respects.[4] Unlike other constitutional rights, its denial may actually benefit the accused since in certain instances delay may work to his advantage. For instance, the passage of time and the concomitant memory failure of individual witnesses may make it more difficult for the state to meet its burden of proving guilt beyond a reasonable doubt. Another unique characteristic of the constitutional right to a speedy trial is that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interest of the accused."[5] In addition, the concept of speedy trial is imprecise because the term "speedy" is ambiguous.

In *Barker v. Wingo*, [6] the United States Supreme Court listed four factors that courts should consider to determine whether an accused has been denied his constitutional right to a speedy trial. First, the court should consider the length of delay. This factor acts as a triggering device. If the delay appears long under the circumstances, then the court will apply the other three factors to determine if an accused was denied a speedy trial. Second, the court will look at the reason for the delay. Third, the court will inquire whether the accused asserted his right to a speedy trial. Fourth, the court will determine whether the delay prejudiced the accused. The Court realized that this four-pronged test would present difficulties in application, but was unwilling to require as a matter of constitutional law

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1. "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . . " U.S. CONST. amend. VI.

2. Klopfer v. North Carolina, 386 U.S. 213 (1967).

3. Smith v. Hooey, 393 U.S. 374, 377-78 (1969) (citing United States v. Ewell, 383 U.S. 116, 120 (1966)).

4. Barker v. Wingo, 407 U.S. 514 (1972).

5. *Id.* at 519.

6. *Id.* at 530.

that an accused must be brought to trial within a specific time limit.[7] The Court, however, noted that the individual states could prescribe specified time periods in order to make this imprecise right more precise if they chose.[8]

Each of the states provides for the right to a speedy trial in its own constitution, its statutes or rules of criminal procedure, or a combination of these.[9] In Ohio, a criminal defendant has both a constitutional right to "a speedy public trial"[10] and a statutory right to be brought to trial within a specified number of days after arrest or service of summons.[11]

This Comment will review court decisions interpreting the various

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7. "We find no constitutional basis for holding that the speedy trial right can be quantified into a specific number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise." *Id.* at 523.

8. *Id.*

9. Klopfer v. North Carolina, 386 U.S. 213, 226 (1967). "[E]ach of the 50 States guarantees the right to a speedy trial to its citizens." *See* Comment, *The Convict's Right to a Speedy Trial*, 61 J. CRIM. L.C. & P.S. 352, 356 (1970).

10. OHIO CONST. art. I, § 10. The Ohio constitutional guarantee is coterminous with the federal. State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969).

11. From 1869 to 1973, Ohio's speedy trial statute had measured permissible pretrial time periods in "terms of court." *E.g.*, 113 Ohio Laws 193, § 13447-1 (1929) (current version at OHIO REV. CODE ANN. §§ 2945.71-.73 (Page 1975 & Supp. 1978)). "A term of court [is] the space of time during which a court holds a session." 14 OHIO JUR. 2d *Courts* § 75 (1955).

In 1973 the Ohio General Assembly repealed that statute and adopted the present law; the full text is as follows:

§ 2945.71 Time within which hearing or trial must be held.

(A) A person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after his arrest or the service of summons.

(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Shall be accorded a preliminary hearing within fifteen days after his arrest;

(2) Shall be brought to trial within two hundred seventy days after his arrest.

(D) For purposes of computing time under divisions (A), (B), and (C) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.

(E) This section shall not be construed to modify in any way section 2941.401 [2941.40.1], or sections 2963.30 to 2963.35 of the Revised Code.

§ 2945.72 Extension of time for hearing or trial.

The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

(D) Any period of delay occasioned by the neglect or improper act of the accused;

provisions of the Ohio speedy trial statutes.[12] First, this Comment will discuss cases concerning how time is computed under these statutes. It will next discuss the judicial interpretations concerning the granting of the continuances expressly contemplated within the speedy trial statutes.[13] It will then discuss the result when an accused is not brought to trial or preliminary hearing within the statutorily prescribed time period. Throughout this Comment the writer argues that the decisions construing the Ohio statutes are in effect abrogating an accused's statutory right to a speedy trial. The Ohio courts, it will be shown, are ignoring or finding inapplicable the precise statutory speedy trial time limits and are instead applying a vague constitutional standard to determine if an accused has been provided a speedy trial.

I. FACTORS COMPLICATING THE COMPUTATION OF TIME

A. *Effect When Accused Is Arrested on One Charge and the Charge Is Later Changed*

Ohio Revised Code section 2945.71[14] states that the running of the time period within which one accused of a misdemeanor must be brought

(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

(H) The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion;

(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending.

§ 2945.73 Discharge for delay in trial.

(A) A charge of felony shall be dismissed if the accused is not accorded a preliminary hearing within the time required by sections 2945.71 and 2945.72 of the Revised Code.

(B) Upon motion made at our prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code.

(C) Regardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code, a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge:

(1) For a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged;

(2) For a total period equal to the term of imprisonment allowed in lieu of payment of the maximum fine which may be imposed for the most serious misdemeanor charged, when the offense or offenses charged constitute minor misdemeanors.

(D) When a charge of felony is dismissed pursuant to division (A) of this section, such dismismissal [dismissal] has the same effect as a nolle prosequi. When an accused is discharged pusruant to division (B) or (C) of this section, such discharge is a bar to any further criminal proceedings against him based on the same conduct.

OHIO REV. CODE ANN. 2945.71-.73 (Page 1975 & Supp. 1978) (effective January 1, 1974). The Ohio Supreme Court has ruled that these statutes are not to be applied retroactively. The computation of the limits listed in these statutes is from January 1, 1974, for actions then pending, rather than from the actual earlier date of arrest. State v. McDonald, 48 Ohio St. 2d 66, 357 N.E.2d 40 (1976).

12. *See* Note, *The Right to a Speedy Trial: Ohio Follows the Trend*, 43 U. CIN. L. REV. 610 (1974), for an excellent and detailed discussion of the history of the right to speedy trial, an evaluation of the then newly enacted Ohio speedy trial statutes, and a comparison of these provisions with those of other states.

13. *See* OHIO REV. CODE ANN. § 2945.72(H) (Page Supp. 1978) *quoted at* note 11 *supra*.

14. The text of the statute appears at note 11 *supra*.

to trial is triggered by arrest of or service of summons on the accused. For felonies, the running of the time period is triggered by the accused's arrest.[15] Section 2945.71 sets time limits following arrest or service within which an accused must be given a hearing or be brought to trial.[16] Unlike the speedy trial provisions of some states,[17] Ohio's sets forth different time periods within which an accused must be brought to trial depending upon the nature of the charge pending. A person charged with a minor misdemeanor[18] must be brought to trial within fifteen days; a person charged with a third or fourth degree misdemeanor[19] must be brought to trial within forty-five days; a person charged with a misdemeanor of the first or second degree[20] must be brought to trial within ninety days. A person charged with a felony must be accorded a preliminary hearing within fifteen days of arrest and must be tried with 270 days after his arrest.

Because the speedy trial time limits vary depending upon the nature of the offense charged, a problem arises when an accused is arrested on one charge and the charge is later changed. For instance, an accused may be

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15. One commentator has argued that the time period should be triggered by the filing of charges if the filing occurs prior to arrest. *See* Note, *supra* note 12. *See also* Annot., 85 A.L.R.2d 980 (1962) for a general discussion of the extent to which delay between filing of charges and arrest of the accused should constitute a violation of the right to a speedy trial. In State v. Cornell, 44 Ohio Misc. 29, 335 N.E.2d 891 (1975), the court held that a 35 month delay between the filing of an indictment and the arrest of accused who lived and worked in the area, was listed in the telephone book, and was available throughout the period of delay, was a denial of the constitutional right to a speedy trial.

16. The Ohio speedy trial statutes do not contain a provision concerning whether the time limits are applicable in cases of mistrial, retrial, or trial de novo. Some states explicitly provide that their statutes apply in these instances. *See, e.g.*, KAN. STAT. § 22-3402(d) (4) (Supp. 1978) ("In the event a mistrial is declared or a conviction is reversed on appeal to the supreme court or court of appeals, the time limitations provided herein shall commence to run from the date the mistrial is declared or the date the mandate of the supreme court or court of appeals is filed in the district court.").

The Ohio Supreme Court has never decided whether the speedy trial statutes are applicable in these cases. The Court did, however, overrule a motion to certify the record in State v. Gettys, 49 Ohio App. 2d 241, 360 N.E.2d 735 (1976), a case in which an appellate court had ruled that the Ohio speedy trial statutes had no application in retrial. *But cf.* State v. Mackert, No. 77AP-922 (Franklin County Ct. App. May 23, 1978), holding that the speedy trial period begins anew upon reversal and issuance of a mandate by the supreme court to the lower court. *See also* State v. McAllister, 53 Ohio App. 2d 176, 372 N.E.2d 1341 (1977), holding that the statutory time limits did not apply when the accused vacated his no contest plea. *But see* State v. Johnson, 52 Ohio App. 2d 406, 370 N.E.2d 785 (1977), holding that a rescheduling of a case for retrial after a jury had been unable to reach a verdict is a reasonable continuance under section 2945.72(H). In Westerville v. Williams, 48 Ohio St. 2d 243, 358 N.E.2d 540 (1975), the court held that when a criminal defendant is convicted in mayor's court and demands a trial de novo in municipal court, the statutory speedy trial time provisions apply from the time the record is certified from mayor's court to the municipal court and the appeal is docketed.

The Ohio courts have held that the Ohio speedy trial statutes do not apply in juvenile proceedings. State v. Reed, 54 Ohio App. 2d 193, 376 N.E.2d 609 (1977) (motion for leave to appeal overruled by the Ohio Supreme Court on January 18, 1978); State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977). If, however, the state files a motion to transfer a proceeding from juvenile court to a court of common pleas, the statutory time limits have been held to run after the juvenile court relinquishes jurisdiction and transfers the accused to the common pleas court. State v. Young, 44 Ohio App. 2d 387, 339 N.E.2d 668 (1975).

17. *E.g.*, ILL. ANN. STAT. ch. 38, § 103-5 (Smith-Hurd Supp. 1978); KAN. STAT. § 22-3402 (Supp. 1978).

18. OHIO REV. CODE ANN. § 2929.21 (Page 1975) defines the various types of misdemeanors in Ohio.

19. *Id.*

20. *Id.*

arrested on a felony charge that is later reduced to a first degree misdemeanor charge. This means that the accused must be brought to trial within ninety days instead of 270. What happens if one hundred days have already passed before the reduction was made? Should the accused be discharged because he was not brought to trial within ninety days of arrest? Or do the hundred days of pretrial confinement not count because they were imposed under a different charge? In other words, does the ninety-day time limit for the misdemeanor charge start to run only after the misdemeanor charge is pending against the accused?

In *State v. Walker*,[21] the defendant was arrested on January 15, 1974, for allegedly beating a baby. The baby subsequently died on January 17, 1974. On January 22, 1974, the charge was escalated to manslaughter. The Jefferson County Court of Appeals held that the speedy trial time period began to run on January 22, 1974. The court based its decision on the fact that defendant was convicted on the manslaughter charge and not on the charge for which he was originally arrested. It determined that the speedy trial time begins to run only after the defendant is charged with the specific offense for which he is subsequently brought to trial.

The Summit County Court of Appeals in *State v. Sauers* held that "the date from which the speedy trial provisions of R.C. 2945.71 begin to run for an accused whose original felony charge has been reduced to a misdemeanor is the date the summons was served for the lesser offense."[22] The defendant had been arrested on a charge of aggravated burglary, a first degree felony. The grand jury, however, returned an indictment for criminal trespass, a fourth degree misdemeanor. Therefore, instead of having 270 days to bring defendant to trial as it would under a felony charge, the state had only forty-five days in which to bring defendant to trial for the misdemeanor charge. Ninety-nine statutory days[23] had elapsed between defendant's arrest on the felony charge and the service of process on him of the misdemeanor charge. The court reasoned that "the defendant's felony charge . . . was dismissed by the grand jury and a new charge followed. This new charge brought into action the statutory time limitations relating to misdemeanors. The time limitations of the statute relating to felonies were no longer applicable."[24]

The *Sauers* court thus interpreted the statute to say that each time an accused's charge is changed the statutory time period begins anew. The court gave no justification for this interpretation other than that the statute speaks of "a pending charge" in calculating the applicable time period. The

21. 42 Ohio App. 2d 41, 327 N.E.2d 796 (1974).

22. 52 Ohio App. 2d 113,113, 368 N.E.2d 334, 335 (1977), *aff'g* 52 Ohio Misc. 19, 368 N.E.2d 342 (1977).

23. The defendant had spent 30 days in jail on the pending felony charge. Since § 2945.71(D) provides that each day defendant is held in jail in lieu of bond is to be counted as three days; the 30 days in jail count as 90 days. Defendant had also spent nine days out on bond before the charge against him was reduced. Thus, he had a total of 99 statutory days worth of "credit."

24. 52 Ohio App. 2d 113, 114, 368 N.E.2d 334, 335 (1977).

court completely ignored the purposes behind the speedy trial right: to prevent undue pretrial delays; to minimize anxiety accompanying public accusation; and to limit the possibility that delay will limit the accused's ability to defend himself.[25] If the defendant had been correctly charged initially, tried within the statutory period specified for that charge, convicted, and sentenced to the maximum penalty possible, he probably would have served his time and been released within ninety days.[26] Moreover, the holding in *Sauers* provides a strong motive for prosecutors to overcharge initially since the time spent on the charge will not count under the speedy trial statutes if the charge is later reduced.

A better holding in both *Walker* and *Sauers* would have been that, for speedy trial purposes, the initial arrest or service of summons resulting from an illegal act triggers the running of the statutory time period and that a subsequent change of the charge does not cause the time period to begin anew. The first charge should set the time running; the charge for which the accused is ultimately brought to trial should determine the length of the period.[27] To hold otherwise encourages initial overcharging or subsequent charge changing by the prosecution to defeat the speedy trial time limits.[28]

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25. *See* note 3 and accompanying text *supra*.

26. The maximum jail sentence possible for violation of a fourth degree misdemeanor is thirty days in jail. OHIO REV. CODE ANN. § 2929.21(B)(4)(Page 1975). A person accused of a fourth degree misdemeanor must be brought to trial within 45 days of arrest or service of summons. Therefore, if the accused had been tried on the 45th day and immediately sentenced to serve 30 days, only 75 days would have elapsed.

Actually, it is arguable that the court erred in not dismissing defendant in this case pursuant to OHIO REV. CODE ANN. § 2945.73(C)(1)(Page 1975), which states:

> Regardless of whether a longer limit may be provided by sections 2945.71 and 2945.72 . . . a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge . . . [f]or a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged;

In *Sauers*, defendant had been held in jail for 30 days after his arrest (October 22 to November 21) on the felony charge. Regardless of the fact that the felony charge was reduced to a misdemeanor, defendant had already spent 30 days (the maximum possible sentence) in jail as a consequence of his illegal conduct.

27. Assume an accused is arrested on a felony charge and incarcerated. As a result of plea negotiations the accused pleads no contest to a misdemeanor. Assume further that the accused has already been incarcerated beyond the period allowed by the speedy trial statutes for someone charged with this misdemeanor. If the time the accused spent in jail on the felony is credited to the accused in computing the speedy trial period, the accused would be entitled to discharge and dismissal of the charge with no resulting conviction. Such a result would have the unfortunate effect of circumscribing the range of possible plea negotiations. It is possible to avoid this result, however, by making it a part of the plea bargaining agreement that the accused has waived his statutory right to a speedy trial.

Although the time already served would thus have no significance for computation of the speedy trial period, it should be credited to reduce any jail sentence received upon conviction. One Ohio appellate court has held that the equal protection clause of the fourteenth amendment requires that persons held in jail on a felony charge receive full credit for the period of their pretrial incarceration through deduction of that period from the maximum sentence imposed even when conviction is for a lesser included misdemeanor offense. Haddox v. Houser, 44 Ohio App. 2d 389, 339 N.E.2d 666 (1975).

28. Dayton v. Peterson, 56 Ohio Misc. 12, 381 N.E.2d 1154 (1978), concerned the reverse situation. In *Peterson*, defendant had been charged with a minor misdemeanor. Section 2945.71(A) requires that a person charged with a minor misdemeanor be brought to trial within 30 days of arrest or service of summons. Defendant was not tried until 45 days after his arrest. At trial the state proved the elements necessary to convict defendant of a fourth degree misdemeanor. A person charged with a fourth degree misdemeanor has to be brought to trial within 45 days. The prosecution argued that since defendant was actually guilty of the fourth degree misdemeanor, the 45 day limit should apply and that

B. *Effect When Original Charges Are Dismissed Without Prejudice and the Accused Is Subsequently Charged With the Same Offense*

In situations in which the original charge against an accused is dismissed without prejudice and the accused is subsequently charged again for the same offense, the majority of jurisdictions[29] take the approach that, because the recharging is a new proceeding, the statutory speedy trial time limitations apply only from the date of the recharge. There are two minority approaches.[30] Both are based on the premise that the state should not be able to circumvent the effect of a speedy trial statute by filing a nolle prosequi or by allowing the case to be dismissed for want of prosecution. One minority approach is that recommended by the American Bar Association (ABA) in its Standards Relating to Speedy Trial.[31] The ABA approach requires that the time between the service of the original summons and its dismissal be counted for purposes of speedy trial. The ABA approach does not count the time between the date of the dismissal and the date of the second service of summons. The ABA reasons that this latter period should not be counted since the accused has no charge pending against him during this period. The other minority view, here designated the strict approach, holds that the computation of the time within which accused must be brought to trial is measured from the time of arrest or service of summons on the original charge. Dismissing the charge does not toll the running of the statutory period under this approach.[32]

The Ohio Supreme Court recently addressed the recharging issue for the first time[33] in *Westlake v. Cougill*.[34] Defendant had received a summons on January 15, 1976. The case was dismissed without prejudice on February 19, 1976. On March 2, 1976, defendant received a second summons charging the same offense. The court took the approach recommended by the ABA and held that the time from the service of the original summons to its dismissal would be counted for purposes of speedy trial. The court held that the time between the date of dismissal and the

defendant, therefore, was provided a speedy trial. The court felt, however, that it would be unfair to change the complaint charging a minor misdemeanor to one charging a fourth degree misdemeanor after trial. Defendant was discharged for failure to be brought to trial within the statutory time limit for minor misdemeanors.

29. *See* Annot., 30 A.L.R.2d 462 (1953), discussed in State v. Stephens, 52 Ohio App. 2d 361, 370-71, 370 N.E.2d 759, 766 (1977). *See also* State v. Avriett, 25 Ariz. App. 63, 540 P.2d 1282 (1975), and State v. Fink, 217 Kan. 671, 538 P.2d 1390 (1975), which support the majority approach.

30. *See* Annot., 30 A.L.R.2d 462 (1953).

31. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.3(f) & Comments (Approved Draft 1968) [hereinafter cited as ABA STANDARDS].

32. *See* Thigpen v. State, 350 So. 2d 1078 (Fla. App.), *cert dismissed*, 354 So. 2d 986 (Fla. 1978). *See also* Recent Cases, 81 DICK. L. REV. 387-94 (1977), discussing a recent decision of the Pennsylvania Supreme Court that adopts the strict approach.

33. The issue had previously been addressed in two appellate court cases. State v. Stephens, 52 Ohio App. 2d 361, 370 N.E.2d 759 (1977); State v. Justice, 49 Ohio App. 2d 46, 358 N.E.2d 1382 (1976).

34. 56 Ohio St. 2d 230, 383 N.E.2d 599 (1978).

date of the second service of summons would not count since, it reasoned, defendant had no charge pending against him during this period.

While the middle ground taken by the Ohio Supreme Court is preferable to the majority approach, the court should have adopted the strict approach. It comports more closely with the concept of the right to a speedy trial. The purpose of the speedy trial statutes is to make precise the imprecise constitutional guarantee of a speedy trial. These statutes should be strictly construed by the court to secure the end sought by the legislature.[35] "[T]o permit the state to deprive an accused of the right to discharge by the simple expedient of nol-prossing the original indictment and procuring a new indictment for the same offense is, in effect, to rewrite the statute . . . ."[36] The strict approach acknowledges what is actually the case: although the dismissal formally removes the charges, the charges are actually "pending" against the accused since the state is using the time between the dismissal and the second charging to develop its case against the accused.

C. *Effect of Delays on Computing the Speedy Trial Time*

Ohio Revised Code section 2945.72 lists in separate subsections (A) through (I) nine factors that extend the period of time during which an accused must be brought to trial. Four of these factors provide for the extension of the statutory period for "any period of delay" occasioned or necessitated by certain enumerated actions generally within the control of the accused,[37] such as improper acts or filing of defense motions. Four other factors extend the statutory period to include the "period during which"[38] certain circumstances generally not within the control of the accused are present. Examples include the period during which an accused is mentally incompetent to stand trial or during which his competence is being evaluated. The statutory period may also be extended, under section 2945.72(H), by continuances. This factor fits into neither of the two preceding categories.

Because Ohio maintains no formal records of legislative history, it is not known whether the Ohio General Assembly intended this distinction in terms to have any effect in determining the period to be excluded. The ABA Standards provide no assistance on this point because they use the term "period of delay" to describe all excluded periods regardless of the role of the accused in bringing about the excluded period.[39]

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35. State v. Silver, 57 Ohio St. 2d 1, 384 N.E.2d 710 (1979); State v. Wentworth, 54 Ohio St. 2d 171, 375 N.E.2d 424 (1978); State v. Tope, 53 Ohio St. 2d 250, 374 N.E.2d 152 (1978); State v. Singer, 50 Ohio St. 2d 103, 362 N.E.2d 1216 (1977); State v. MacDonald, 48 Ohio St. 2d 66, 357 N.E.2d 40 (1976); State v. Pudlock, 44 Ohio St. 2d 104, 338 N.E.2d 524 (1975).

36. Annot., 30 A.L.R.2d 462, 465 (1953).

37. *See* OHIO REV. CODE ANN. §§ 2945.72(C)-.72(F), *quoted at* note 11 *supra*.

38. *See id.* § 2945.72(A), .72(B), .72(G), .72(I), *quoted at* note 11 *supra*.

39. *See* ABA STANDARDS, *supra* note 31, § 2.3(a)-.3(h).

The Supreme Court of Ohio has never construed this distinction in the language of section 2945.72, but a related issue came before the Belmont County Court of Appeals in *State v. Lacy*.[40] In that case the defendant was arrested on a felony charge on October 9, 1974, and incarcerated until trial because he was unable to post bond. On December 3, 1974, the trial court set the trial date for January 9, 1975. Thus, the trial date was set for ninety-two days after arrest—two days beyond statutory maximum. On December 18, 1974, the defendant filed a motion for change of venue, which was overruled on January 6, 1975, and the defendant was brought to trial on January 9, 1975, as previously assigned. The issue, therefore, was whether the pendency of the motion constituted a "period of delay" occasioned by the accused. The majority in *Lacy* held that during the nineteen-day period the accused's motion was pending the court's "right to change defendant's trial date to comply with R. C. 2945.71 was suspended . . . ."[41] For this reason the nineteen days constituted a "period of delay necessitated by reason of a . . . motion . . . instituted by the accused"[42] under subsection 2945.72(E). Therefore, the court held that the time within which the accused had to be brought to trial was extended nineteen days and thus the January 9 trial date was within the statutory period. In a vigorous dissent, Judge Joseph O'Neill argued that no *delay* had been necessitated as a result of the accused's motion. He argued that because the motion had not delayed the case from going to trial on the date already assigned, there was no reason to attribute a nineteen-day delay to the accused. He would have discharged the accused for failure of the state to bring him to trial within the statutorily prescribed period of ninety days.[43]

Although the Ohio Supreme Court has not ruled directly on the issue presented in *Lacy*,[44] other jurisdictions have generally held that the entire period of the pendency of an accused's motion is a delay that is to be excepted from the time in which an accused must be brought to trial.[45] An alternative approach is contained in the federal Speedy Trial Act of 1974.[46]

40. 46 Ohio App. 2d 215, 348 N.E.2d 381 (1975).

41. *Id.* at 216, 348 N.E.2d at 383.

42. OHIO REV. CODE ANN. § 2945.72(E) (Page Supp. 1978).

43. Judge O'Neill went on to say that while no one wanted to see a guilty person go free because of errors in procedural calculations, the right to a speedy trial is an important constitutional right and the provisions of §§ 2945.71-.73 must be strictly complied with since they are the legislature's enactment of the constitutional right. State v. Lacy, 46 Ohio App. 2d 215, 219, 348 N.E.2d 381, 384 (1975).

44. *See generally* State v. Ladd, 56 Ohio St. 2d 197, 383 N.E.2d 579 (1978), construing § 2945.72(C) (defendant received no credit for seven-day period of delay necessitated by request for time to acquire services of attorney); State v. Walker, 46 Ohio St. 2d 157, 346 N.E.2d 687 (1976) (held, "[t]he time elapsing between the tendering of a plea of 'not guilty by reason of insanity' and a finding of mental competency to stand trial directly resulting from such plea shall not be included in computing days under 2945.72").

45. *See, e.g.*, Rudstein, *Speedy Trial in Illinois: The Statutory Right*, 25 DEPAUL L. REV. 317, 322-52 (1976) (discussing the Illinois speedy trial statute); Note, *Speedy Trial Protection for Criminal Defendants Under Indiana's Criminal Rule 4*, 8 VAL. L. REV. 683, 692-93 (1974) (discussing the Indiana rule of criminal procedure concerning speedy trial).

46. 18 U.S.C. §§ 3161-74 (1976).

The federal Act does not exclude the entire pendency of the motion from counting in speedy trial time calculation, but specifically provides that only delay resulting from the actual hearings on the pretrial motions is to be excluded.[47]

The approach adopted in the federal Act is preferable because it encourages expeditious handling of criminal cases. Defense counsel ought to be able to estimate accurately how long hearings on motions will take and make a reasoned determination whether a motion would be worth the extension that would result under the federal Act. By contrast, treating the entire period that a motion is pending as an excludable delay enables the trial court to "sit on" a case by taking a long time to rule on the motion. An accused might well be discouraged from filing legitimate motions because he could not predict the degree to which such motions might extend the time within which he must be brought to trial.

D. *Effect of the Triple-Count Provision on Computing Time When Accused Is Incarcerated on Multiple Charges*

Section 2945.71(D) defines what is commonly called "triple-count credit": "[E]ach day during which the accused is held in jail in lieu of bond on the pending charge shall be counted as three days." For instance, an accused charged with a felony must be brought to trial within 270 days of arrest if out on bond, but within ninety days if held in jail while awaiting trial. In many instances the application of triple-count credit presents no problem,[48] but when the accused is being held in jail on more than one pending charge, it is unclear whether the accused is entitled to triple-count credit on any or all of the pending charges.

Cases construing the former Ohio speedy trial statutes had held that the accelerated trial provisions of those statutes were applicable only when accused's detention resulted solely from the charge from which he was seeking a discharge.[49] The former statutes did not contain a triple-count provision. They did, however, provide that an incarcerated accused had to be brought to trial within two terms of the court, but that the state had three terms in which to begin to try an accused out on bond.[50] These cases held that an incarcerated accused received the benefit of the two-term provision only if he had a single charge pending against him; the presence of multiple charges abolished an accused's right to be brought to trial within two terms on any of the charges.

In *State v. MacDonald*,[51] the Ohio Supreme Court first addressed the applicability of the triple-count provision to an accused with multiple

47. *Id.* § 3161(h)(E).

48. *See, e.g.*, State v. Tope, 53 Ohio St. 2d 250, 374 N.E.2d 152 (1978).

49. State v. Fairbanks, 32 Ohio St. 2d 34, 289 N.E.2d 352 (1972); State *ex rel.* Hodges v. Coller, 19 Ohio St. 2d 164, 249 N.E.2d 885 (1969); State v. Gray, 1 Ohio St. 2d 21, 203 N.E.2d 319 (1964).

50. *See* note 11 *supra*.

51. 48 Ohio St. 2d 66, 357 N.E.2d 40 (1976).

charges pending against him.[52] Defendant was being detained on both state and federal charges. The court held that defendant was not entitled to the triple-count provision because he was not being held *solely* on the pending state charge that was the object of the speedy trial statute. The court's reasoning was:

> The objective of former R.C. 2945.71 is substantially the same as that of present R.C. 2945.71(D). Both seek to insure that defendants are not held in jail for undue periods of time while awaiting trial. We see no justification for altering prior case law since the basic objective of the former statute has been preserved.[53]

The court has reaffirmed *MacDonald* in subsequent cases.[54] Recently, however, the court announced in *State v. Ladd* [55] that it would not blindly adhere to *MacDonald*, but would instead scrutinize closely the charges pending against the defendant to prevent "a prosecutor['s] . . . add[ing] a frivolous charge to a meritorious one in order to invoke *MacDonald* and thus deny a defendant the benefit of R.C. 2945.71(D)."[56]

State v. Ladd is an important decision because it demonstrates the danger that can result when the courts must deal with an issue on which the statute is ambiguous. The majority in *Ladd* first admonished the legislature for enacting ambiguous statutes, and then asserted that the legislative "rationale supporting these statutory provisions was to prevent inexcusable delays caused by indolence within the judicial system."[57] The court went on to say that "where the system is without fault, we will not enforce these rigorous time limitations when a narrowing construction or a finding of total inapplicability of the statute on the facts would better comport with presumed legislative purpose."[58]

Justice William Brown argued in his dissenting opinion in *Ladd* that the majority had presumed a nonexistent legislative purpose. He argued that "[i]f the majority is attempting to introduce a fault standard into the application of these statutes, it does so against the clear weight of authority. The language of R.C. 2945.71 and its predecessor is and was mandatory, and this court has consistently held those statutes must be complied with."[59]

The *Ladd* majority's insistence that it will not enforce the speedy trial

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52. In two previous cases the courts of appeals seem to have assumed that when a person who has been charged with a felony is detained in jail on a "hold" imposed by his parole officer, he is entitled to triple-count credit. State v. Kelly, 44 Ohio App. 2d 40, 335 N.E.2d 729 (1974); State v. Walker, 42 Ohio App. 2d 41, 327 N.E.2d 796 (1974). Judge O'Neill, concurring in *Walker*, disagreed.

53. 48 Ohio St. 2d at 70, 357 N.E.2d at 43.

54. State v. Martin, 56 Ohio St. 2d 207, 384 N.E.2d 239 (1978); State v. Ladd, 56 Ohio St. 2d 197, 383 N.E.2d 579 (1978); State v. Kaiser, 56 Ohio St. 2d 29, 381 N.E.2d 633 (1978). *See also* State v. Thieshen, 55 Ohio App. 2d 99, 379 N.E.2d 622 (1977).

55. 56 Ohio St. 2d 197, 383 N.E.2d 579 (1978).

56. *Id.* at 203 n.4, 383 N.E.2d at 583 n.4.

57. *Id.* at 200, 383 N.E.2d at 581.

58. *Id.* at 202, 383 N.E.2d at 582-83

59. *Id.* at 204 n.5, 383 N.E.2d at 583 n.5.

statutes except when the judicial system has been at fault in causing the delay is indeed unprecedented. In a long line of previous cases the court held that sections 2945.71 to 2945.73 are mandatory and must be strictly complied with.[60] Moreover, the court previously had held that the purpose behind the enactment of the speedy trial statutes was "to insure that defendants are not held in jail for undue periods of time while awaiting trial."[61] It is clear that the legislature enacted specified time limits to insure a speedy trial in all instances and not only when the judicial system was at fault.

The *Ladd* court's position that an accused's "personal crime wave cannot be allowed to put the state in a position of having to try him on each count within 90 days"[62] seems incorrect and unnecessary. Section 2945.71(A) provides for an extension of the speedy trial time limit for "[a]ny period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state . . . provided that the prosecution exercises reasonable diligence to secure his availability."[63] At a minimum, this provision would toll the running of the speedy trial period on all other pending charges in the jurisdiction while the accused was being tried on one of the charges. The legislature might well have thought that extensions for the period of trial on other pending charges would provide the state with enough time to try the accused on all charges, yet allow the triple-count provision to be applied.

In light of the Ohio Supreme Court's holdings in *MacDonald* and *Ladd*, it would be useful for the Ohio legislature to amend the present speedy trial statutes to explicitly cover the situation of an accused who has multiple charges pending against him. The legislature could do this by making it clear that such an accused is to receive the benefit of the triple-count provision and that the state can use section 2945.72(A) to extend the time. Alternatively, Ohio might follow an Illlinois speedy trial provision[64] that a person incarcerated in a county in which more than one charge is pending against him is to be tried on one charge within the accelerated statutory period. He must then be tried on all other charges within 160 days of the termination of the first trial.

II. GRANTING CONTINUANCES UNDER THE SPEEDY TRIAL STATUTES

Section 2945.72(H) provides for an extension of the speedy trial time limitations for the period of any continuance granted on the accused's own

60. *E.g.*, State v. Wentworth, 54 Ohio St. 2d 171, 375 N.E.2d 424 (1978); State v. Singer, 50 Ohio St. 2d 103, 362 N.E.2d 1216 (1977); State v. Pudlock, 44 Ohio St. 2d 104, 338 N.E.2d 524 (1975).

61. State v. MacDonald, 48 Ohio St. 2d 66, 70, 357 N.E.2d 40, 43 (1976).

62. 56 Ohio St. 2d at 203, 383 N.E2d at 583.

63. OHIO REV. CODE ANN. § 2945.72(A) (Page Supp. 1978).

64. ILL. REV. STAT. ch. 38, § 103-5 (Smith-Hurd Supp. 1978).

motion or for the period of any reasonable continuance granted other than upon the accused's own motion.[65] This amorphous provision permits enormous judicial discretion over the effectiveness of the speedy trial statute.

In *State v. Johnson*,[66] the Franklin County Court of Appeals held that the rescheduling of a case for a second trial after a jury was unable to reach a verdict in the first trial was a reasonable continuance granted other than upon the accused's own motion under section 2945.72(H). In dicta in a concurring opinion and a dissenting opinion in *State ex rel. Dayton Newspapers v. Phillips*,[67] two justices debated whether a continuance could be granted pursuant to section 2945.72(H) to permit publicity to abate.[68]

Most of the reported cases that deal with section 2945.72(H), however, concern one of two issues. One issue is whether a court may use this provision to grant a continuance because of court congestion. The second issue concerns whether the trial date may initially be set outside the time limit prescribed by this subsection if the accused's attorney agrees to the delayed date.

A. *Whether Section 2945.72(H) Permits Continuances for Court Congestion*

Realizing the deleterious effect of an expansive interpretation of section 2945.72(H) on the right to a speedy trial, the Ohio Supreme Court asserted in *State v. Pudlock*[69] that practices that would undermine the effectiveness of the speedy trial statutes would not be allowed. Specifically, the court held that a trial judge could not rule sua sponte after the expiration of the statutory period that the presence of a crowded docket permitted a continuance granted other than upon the accused's own motion.

Subsequently, in *State v. Lee*,[70] the court interpreted section 2945.72(H) to permit continuances for crowded dockets if the trial judge stated his reasons in a journal entry prior to the expiration of the time limit. The court recognized that "to construe R.C. 2945.72[(H)] too broadly would render meaningless, and thwart the direction of, the speedy-trial statutes,"[71] yet found the disputed continuance permissible. In *Lee*, the trial judge notified the defendant, who did not object, that he was extending the trial two days beyond the time limit. The reasons cited by the

65. OHIO REV. CODE ANN. § 2945.72(H) (Page Supp. 1978), *quoted at* note 11 *supra*.

66. 52 Ohio App. 2d 406, 370 N.E.2d 785 (1977).

67. 46 Ohio St. 2d 457, 469, 351 N.E.2d 127, 135 (1976) (Stern, J., concurring); *id.* at 523 n.59, 351 N.E.2d at 165-66 n.59 (1976) (Celebrezze, J., dissenting).

68. That continuance might be used as a remedy for pretrial publicity was suggested by the United States Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966).

69. 44 Ohio St. 2d 104, 338 N.E.2d 524 (1976).

70. 48 Ohio St. 2d 208, 357 N.E.2d 1095 (1976).

71. *Id.* at 209, 357 N.E.2d at 1096.

judge in a journal entry were a crowded docket and a judicial conference. The Ohio Supreme Court noted that the legislature left section 2945.72(H) purposely ambiguous to provide the courts flexibility to determine if in some instances extensions were merited for reasons other than those specifically enumerated in sections 2945.72(A) through 2945.72(G).[72] The court thought that the reasons stated in the journal entry merited a two-day continuance.

In *State v. Wentworth*,[73] accused was arrested on September 20, 1975, and charged with a misdemeanor that required him to be brought to trial within ninety days of arrest. Accused refused to waive his statutory right to a speedy trial at his pretrial hearing on October 14, 1975. "At the conclusion of the pre-trial, the court, utilizing a form entry wherein it was stated, 'The crowded condition of the courts [*sic*] docket does not permit an earlier setting,' and without additional supplementation or documentation in the record, continued the case, pursuant to R.C. 2945.72(H), until April 12, 1976,"[74] a continuance of approximately six months.

In *Wentworth*, the Ohio Supreme Court found the six-month continuance to be unreasonable and discharged the defendant. The court, nevertheless, refused to declare a six-month continuance per se unreasonable. Instead, the court stated that

> where the continuance is of such length that it is facially unreasonable and seriously open to question, and thus outside the rationale upon which *Lee* is based, the attendant facts and circumstances must be included in the record in sufficient detail so that the necessity and reasonableness of the continuance is demonstrable.[75]

The vagueness of this instruction limits its value to a trial judge. The court provides no guidelines for determining what length of time is facially unreasonable. Furthermore, the court does not give examples of any facts or circumstances that would demonstrate the necessity and reasonableness of the continuance. In *Lee*, a two-day continuance in a felony case was reasonable when the journal entry cited both a crowded docket and a judicial conference. In *Wentworth*, a six-month continuance in a misdemeanor case was unreasonable and seriously open to question even though the journal entry cited the crowded condition of the court docket as the reason for the continuance.[76] Moreover, the purpose behind the speedy

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72. OHIO REV. CODE ANN. §§ 2945.72(A)-.72(I) (Page Supp. 1978), *quoted at* note 11 *supra*.

73. 54 Ohio St. 2d 171, 375 N.E.2d 424 (1978).

74. *Id.* at 171-72, 375 N.E.2d at 425.

75. *Id.* at 175, 375 N.E.2d at 427.

76. *See* Elmwood Place v. Denike, 56 Ohio St. 2d 427, 384 N.E. 2d 707 (1978). Defendant was arrested for a misdemeanor that required commencement of trial within 90 days. The court granted a 123-day continuance citing in the record a standardized form stating that the crowded condition of the court docket prevented the trial from being held within the statutory period. The record also contained a statement of the trial court made at the hearing on defendant's motion to dismiss for want of a speedy trial. At that time the judge stated, " 'We had some idea that there were going to be twenty-two witnesses. That's to indicate to the Assignment Commission that we were going to have a lengthy trial

trial statutes is to make precise the time period within which an accused must be brought to trial. The court's use of a "reasonableness" test defeats the goal of setting specified time limits.

In *Wentworth*, the court cited to, but expressly did not suggest agreement with, the ABA Standards Relating to Speedy Trial. These standards approve continuances because of crowded dockets only in cases of exceptional circumstances and not merely because of chronic court congestion. The ABA reasoned that:

> (1) The defendant can be prejudiced by delay, whatever the source . . . . (2) Such delays are contrary to the public interest in the prompt disposition of criminal cases. (3) If congestion excuses long delays, there is lacking sufficient inducement for the state to remedy congestion. (4) The calendar problems which arise out of trying to make maximum use of existing facilities do not ordinarily require time beyond that otherwise allowed.[77]

The ABA Standards suggest large-scale riots or mass public disorder as examples of exceptional circumstances that might justify a delay.

The ABA Standards have been the model for most of the recent state speedy trial statutes. It is likely, therefore, that the Ohio legislature intended to endorse this particular view but failed to do so explicitly. If the Ohio Supreme Court would judicially adopt this standard it would provide state trial judges with firm guidelines by which to determine the propriety of granting a continuance because of court congestion. Moreover, adopting this strict standard would be consistent with the court's acknowledgment of the need to construe 2945.72(H) narrowly.

B. *The Spurious Relationship Between Section 2945.72(H) and the Demand-Waiver Rule*

The demand-waiver rule provides that if an accused fails to demand that his trial be held within the statutorily prescribed period he waives his statutory right to a speedy trial. Jurisdictions that reject the rule believe it should be the state's burden to bring the accused to trial within the statutory period, and reason that use of the rule would unfairly shift this burden onto the accused.[78]

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and it would be more difficult arriving at a suitable date.' " *Id.* at 430, 384 N.E. 2d at 709. The Ohio Supreme Court stated:

> The above evidence of record is insufficient to demonstrate the necessity of a continuance for purposes of appellate review. The fact that a comparatively large number of witnesses was expected to be called to testify at trial does not indicate such an exceptional circumstance as to justify the postponement of the trial date approximately four months beyond the prescribed time period. As noted in *Lee, supra*, at page 209, ' . . . to construe R.C. 2945.72 too broadly would render meaningless, and thwart the direction of, the speedy-trial statutes.'

Id. at 430-31, 384 N.E. 2d at 709.

77. ABA STANDARDS, *supra* note 31, § 2.3(b) & Commentary.

78. *See* Annot., 57 A.L.R.2d 302 (1958) (discussing demand-waiver rule and listing jurisdictions that follow the rule). *See also* Rudstein, *supra* note 45, at 327-29, for a discussion of the relationship of the demand-waiver rule to the Illinois speedy trial statute, and Note, *supra* note 45, at 707-09, for a discussion of the relationship of the demand-waiver rule to the Indiana speedy trial rule.

In *State v. Singer*,[79] the Supreme Court of Ohio rejected application of the demand-waiver rule, holding instead that an accused's statutory right to a speedy trial is not affected by his failure to demand trial. The court noted that the only duty imposed upon the accused to obtain the benefit of the statutory right to a speedy trial is to make a motion for discharge for want of a speedy trial either *at* or *prior to* the commencement of trial.[80]

In *State v. Tope*[81] the court reaffirmed its holding in *Singer*. The court rejected the lower court's characterization of the accused's failure to object to a trial scheduled outside the statutory period as a neglectful or improper act that justified extension of the statutory time under section 2945.72(D).[82] The court also said the lower court erred in finding that 2945.72(H) extended the period, since no continuance had ever been granted by the trial court.[83]

The scope of *Singer* and *Tope*, however, appears to have been greatly restricted by the court's subsequent holding in *State v. McRae*.[84] In *McRae* defendant was arrested on February 6, 1976, for alleged commission of a felony. He was incarcerated continuously thereafter. Defense counsel was appointed on April 7, 1976. Two weeks after counsel was appointed, and seventy-five days after defendant's arrest, a pretrial conference attended by the judge, prosecutor, and defense counsel was held. At this conference all parties agreed to a trial date of June 7, 1976, a date thirty days beyond the speedy trial deadline. There was some evidence that at the time of the conference defense counsel was unaware that the trial date had been set outside the statutory period. Ninety-seven days after defendant's arrest, and seven days after the statutory period normally would have expired, defense counsel filed a motion to discharge for want of a speedy trial. The motion was denied. Counsel subsequently requested a continuance of the trial date.

In *McRae* the court addressed the following issues:

> (1) [W]hether the constitutional right to a speedy trial, as implemented in this state by R.C. 2945.71 through 2945.73, can be waived by the attorney of an accused where the accused is not aware of or informed of the waiver and (2) whether a court's scheduling of a trial date beyond the speedy trial deadline constitutes a "continuance granted other than upon the accused's own motion" pursuant to R.C. 2945.72(H) when that trial date is one which the accused's attorney specifically agrees to in a pre-trial conference in which the judge and the attorney for both sides participate.[85]

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79. 50 Ohio St. 2d 103, 106, 362 N.E.2d 1216, 1219 (1977).

80. *Id.* at 107, 362 N.E.2d at 1219. *See* OHIO REV. CODE ANN. § 2945.73(B) (Page Supp. 1978), *quoted at* note 11 *supra*.

81. 53 Ohio St. 2d 250, 374 N.E.2d 152 (1978).

82. *Id.* at 252, 374 N.E.2d at 154. *See* OHIO REV. CODE ANN. § 2945.72(D) (Page Supp. 1978), *quoted at* note 11 *supra*.

83. *Id. See* OHIO REV. CODE ANN. § 2945.72(H) (Page Supp. 1978), *quoted at* note 11 *supra*.

84. 55 Ohio St. 2d 149, 378 N.E.2d 476 (1978).

85. *Id.* at 150, 378 N.E.2d at 477-78.

In resolution of its first issue, the court determined that defense counsel could properly waive the accused's speedy trial right. The court reasoned that since counsel later requested a continuance for reasons of trial preparation, "it [stood] to reason that his agreement to the June 7 date was also made with such considerations in mind."[86]

In resolving its second issue the court held that

> the trial court has the discretion to extend the time limits of R.C. 2945.71 where counsel for the accused voluntarily agrees to a trial date set beyond the statutory time limits . . . . Moreover, the trial court's exercise of that discretion constitutes a " 'continuance granted other than upon the accused's own motion' under the second clause of 2945.72(H)" . . . and, as long as that continuance is reasonable, it extends the time limits of R.C. 2945.71 and does not deny the accused the right to a speedy trial.[87]

The court framed its second issue and holding poorly. There was no need to invoke section 2945.72(H) continuances to resolve the case. The function of a section 2945.72(H) continuance is to extend the statutory period. If an accused's statutory speedy trial right has been waived altogether, there is no need to find a continuance. The court ought properly to have considered only whether counsel's agreement to the initial setting of the trial date beyond the statutory period had constituted waiver of accused's statutory right.

It is apparent from the court's analysis and holding in *McRae* that it has confused the distinct concepts of waiver and continuance. There would be no reason for the court to have determined that defense counsel could waive accused's statutory speedy trial right by assenting to a continuance if it were not concerned with whether defense counsel actually did waive the right. Because the court has confused these two concepts, *McRae* stands for the proposition that an accused does not waive his right to a speedy trial by *failing to object* to a trial date set beyond the statutory period. In this respect it is merely affirming the court's previous decisions in *Singer* and *Tope*. But *McRae* also stands for the proposition that *agreeing* to a trial date set beyond the statutory period *is* a waiver of the statutory right. Thus, the court can be seen to have adopted a modified demand-waiver rule: an accused is not required to *demand* a trial within the statutory period or waive the right; but if an accused is *offered* a trial date outside the statutory period, he must object to that date and demand trial within the statutory period, or he waives his right.

The court in *McRae* in effect shifted onto the accused the burden of ensuring that he is brought to trial within the statutory period, contradicting its own recent decisions placing that burden upon the state and strictly construing the provisions of the speedy trial statutes.[88] Because

86. *Id.* at 152, 378 N.E.2d at 478. The Ohio Supreme Court had previously held that defense counsel could waive an accused's statutory speedy trial right without his consent for reasons of trial preparation. State v. McBreen, 54 Ohio St. 2d 315, 376 N.E.2d 593 (1978).

87. 55 Ohio St. 2d at 152-53, 378 N.E.2d at 479.

88. State v. McBreen, 54 Ohio St. 2d 315, 376 N.E.2d 593 (1978); State v. Wentworth, 54 Ohio

the court has reiterated in cases decided after *McRae* that the burden is wholly upon the state to bring an accused to trial within the statutory period,[89] the only rational explanation for *McRae* is that the court failed to realize the implications of its holding, having confused the concepts of waiver and section 2945.72(H) continuances.[90] *McRae* should be overruled because it unfairly shifts the burden onto the accused to make sure that he is brought to trial within the statutory period.

There is an additional reason for overruling *McRae*. In *McRae* there was no journal entry stating that a continuance had been granted. There was no indication in the record that at the time the trial date was set the judge, prosecutor, or defense counsel knew that the statutory period would be exceeded by the chosen date and that a continuance would be necessary to toll the running of the time limit. Thus, the trial court in *McRae* did not grant a continuance by journal entry prior to the expiration of the statutory period. Instead, the trial court unknowingly set the original trial date beyond the statutory period. On appeal, however, the Ohio Supreme Court ruled that the action of the trial court constituted a continuance. The court determined that it was not necessary that the setting of the trial date beyond the statutory period take the actual form of a continuance, that is, there did not need to be a formal journal entry granting a continuance.[91] The court avoided the need for a formal continuance by equating "the original scheduling of the trial date" with "the granting of a continuance other than upon the accused's own motion" pursuant to section 2945.72(H). It then determined that the reasonableness of this "continuance" was demonstrated on appeal by relying on facts in the record that would have been grounds for granting a continuance had the trial judge realized that the speedy trial period was about to expire.[92] This determination conflicts with prior cases concerning the granting of section 2945.72(H) continuances, in which the court had required without exception that a formal journal entry listing the reasons for the continuance be recorded prior to the expiration of the speedy trial time period.[93]

In *State v. Silver*,[94] decided after *McRae*, the Ohio Supreme Court

St. 2d 171, 375 N.E.2d 424 (1978); State v. Tope, 53 Ohio St. 2d 250, 374 N.E.2d 152 (1978); State v. Singer, 50 Ohio St. 2d 103, 362 N.E.2d 1216 (1977); State v. Lee, 48 Ohio St. 2d 208, 357 N.E.2d 1095 (1976); State v. MacDonald, 48 Ohio St. 2d 66, 357 N.E.2d 40 (1976); State v. Walker, 46 Ohio St. 2d 157, 346 N.E.2d 687 (1976); State v. Pudlock, 44 Ohio St. 2d 104, 338 N.E.2d 524 (1975).

89. State v. Silver, 57 Ohio St. 2d 1, 384 N.E.2d 710 (1979); State v. Cutcher, 56 Ohio St. 2d 383, 384 N.E.2d 275 (1978); State v. Martin, 56 Ohio St. 2d 289, 384 N.E.2d 239 (1978).

90. The dissent in *McRae* did argue that the majority was improperly shifting the burden. State v. McRae, 55 Ohio St. 2d 149, 154, 378 N.E.2d 476, 480 (1978) (Brown, J., dissenting in part and concurring in part). The forcefulness of the dissent's argument, however, was restricted by its failure to distinguish between waiver and continuance.

91. *Id.* at 152-53, 378 N.E.2d at 479.

92. *Id.*

93. *See generally* notes 69-77 and accompanying text *supra* (discussing whether § 2945.72(H) permits continuances for court congestion).

94. 57 Ohio St. 2d 1, 384 N.E.2d 710 (1979).

refused to find that a continuance had been granted when "there [was] *no entry* in the record ever setting a trial date within the time limits provided in R.C. 2945.71[95] *or* giving any reason for the date of defendant's trial being substantially beyond such time limitations."[96] The court nevertheless stated in *Silver* that the prosecution has the mandatory duty of complying with the speedy trial statutes and thus has the burden of bringing an accused to trial within the statutory period. The court has also previously stated that "[i]t is evident that to construe R.C. 2945.71(H) too broadly would render meaningless, and thwart the direction of, the speedy trial statutes."[97]

Anything less than a rule requiring a formal journal entry prior to the expiration of the time period before there can be a section 2945.72(H) continuance *will* thwart the direction of the speedy trial statutes, which have as their purpose to make precise the time within which an accused must be brought to trial. This time can never be precise if the reviewing court can find, after the expiration of the prescribed period, that a continuance had been granted without a formal entry. A formal entry made prior to expiration is necessary to show first, that the trial court was aware the speedy trial time was about to expire, second, that prior to the expiration of the time period there existed proper reasons to extend the period, and third, that the court extended the period expressly for these proper reasons.

III. Effect of Failure to Bring an Accused to Trial or Preliminary Hearing Within the Prescribed Period

A. *When an Accused Is Not Brought to Trial Within the Prescribed Period*

Section 2945.73(B) provides that, upon a motion at or prior to the commencement of trial, an accused will be discharged if he has not been brought to trial within the statutorily prescribed period. Under section 2945.73(D), this discharge will be a bar to any further criminal proceedings against the accused based on the same conduct.

The Ohio Supreme Court has repeatedly held that the denial of a motion to discharge pursuant to section 2945.73(B) is an interlocutory order that is not appealable.[98] The court reasons that when an action is

95. The appellate court in *Silver* stated that a continuance could not be granted under § 2945.72(H) unless the trial court granted the continuance by journal entry prior to the expiration of the statutory time limit. Since this had not been done, it reversed the judgment of the trial court. The Ohio Supreme Court decision does not construe § 2945.72(H) so strictly. It holds that either a judicial entry prior to the expiration of the time limit, *or* the existence of a reason in the record for setting the trial date beyond the statutory limit is adequate to support the finding that a § 2945.72(H) continuance had been granted. The reason need not have been put into the record before the expiration of the time limit. It is enough that it was put into the record some time before appellate review.

96. 57 Ohio St. 2d at 4, 384 N.E.2d at 711 (emphasis added).

97. State v. Lee, 48 Ohio St. 2d 208, 209, 357 N.E.2d 1095, 1096 (1976).

98. Bolus v. Engle, 48 Ohio St. 2d 3, 355 N.E.2d 493 (1976) (delay in preliminary hearing or trial

pending and undetermined in a lower court, a superior court has no authority to determine what the judgment should be in the lower court. After a conviction in the trial court, however, defendant has a right of appeal.[99] The trial court's action overruling the motion may then become one of the assignments of error on appeal. Therefore, if accused wishes to challenge the denial of his motion seeking a discharge for failure of the state to bring him to trial within the statutorily prescribed period, he must first stand trial. If he is convicted, he may appeal. The higher court will then have jurisdiction to determine whether the accused's motion was valid and whether the trial court erred in not discharging the accused. If the trial court did err, the appellate court will discharge him.[100]

B. *When an Accused Is Not Accorded a Preliminary Hearing Within the Prescribed Period*

Section 2945.71(C)(1) provides that a person charged with a felony must be accorded a preliminary hearing within fifteen days of his arrest.[101] The computation rule of section 2945.71(D) is applicable and requires that each day in jail be counted as three days.[102] Thus, an incarcerated person should have his hearing within five actual days. Section 2945.73(A)

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not a ground for habeus corpus after accused has pleaded guilty or been convicted of crime charged, since delay no longer exists); *In re* Singer, 45 Ohio St. 2d 130, 341 N.E.2d 849 (1976) (habeus corpus not proper remedy to test validity of denial of motion to discharge under § 2945.73(B)); State *ex rel.* Racine v. Dull, 44 Ohio St. 2d 72, 337 N.E.2d 776 (1975) (mandamus seeking discharge not proper unless trial court failed to rule on motion seeking discharge pursuant to § 2945.73(B)); State *ex rel.* Wentz v. Correll, 41 Ohio St. 2d 101, 322 N.E.2d 889 (1975) (mandamus compelling dismissal not proper when trial court denied motion to discharge); State *ex rel.* Bell v. Blair, 43 Ohio St. 2d 95, 330 N.E.2d 902 (1975) (applicant whose motion for discharge was overruled not entitled to writ of prohibition preventing further prosecution).

99. OHIO REV. CODE ANN. § 2945.67(A) (Page Supp. 1978) provides that the state can appeal a decision of the trial court granting accused's motion to dismiss for failure to be brought to trial within the statutory period, and § 2945.72(I) provides that the speedy trial time limit be extended during the period of the appeal.

100. *But see* State v. Eberhardt, 56 Ohio App. 2d 193, 193-94, 381 N.E.2d 1357, 1359 (1978), in which the Cuyahoga County Court of Appeals held:

> As a general rule, neither an order overruling a motion to dismiss nor the entry of a *nolle prosequi* in a criminal case is a final appealable order. However, where the record demonstrates that the state failed to afford an accused a timely trial and the accused was therefore entitled to be discharged, but the trial court overruled a motion to dismiss and subsequently allowed a *nolle prosequi* to be entered in the case, the order denying dismissal is a final appealable order because it affected a substantial right and under the circumstances in which it was rendered it in effect determined the action and prevented a judgment within the meaning of R.C. 2505.02.

101. In Ohio an accused does not have a constitutional right to a preliminary hearing. The only purpose of a preliminary hearing is to determine whether sufficient facts exist to warrant the court to bind the accused over to the grand jury and to set bail. Therefore, if an indictment is returned by the grand jury prior to a preliminary hearing, there is no longer any need for a preliminary hearing since a probable cause determination has already been made. State v. Morris, 42 Ohio St. 2d 307, 329 N.E.2d 85 (1975), *cert. denied sub nom.* McSpadden v. Ohio, 423 U.S. 1049 (1976). The preliminary hearing requirement in § 2945.71(C)(1) can, therefore, be read as a requirement that accused be provided a preliminary hearing within 15 days of arrest if the prosecution elects to bring accused to a preliminary hearing before going to the grand jury.

102. A continuance granted pursuant to § 2945.72(H) tolling the period within which the preliminary hearing must be held also tolls the running of the period within which trial must be held. State v. Martin, 56 Ohio St. 2d 289, 384 N.E.2d 239 (1978).

requires that a felony charge be dismissed if an accused is not accorded a preliminary hearing within this period and section 2945.73(D) states that such a dismissal has the same effect as a nolle prosequi.[103]

As a result of the recent Ohio Supreme Court decision in *State v. Pugh*,[104] the effectiveness of these provisions is seriously in doubt. In *Pugh*, defendant was arrested and held in jail for eleven days before he posted bond and was released. Eight days later he was provided a preliminary hearing. At the hearing the defendant filed a motion to have the felony charged dismissed pursuant to the appropriate speedy trial provisions. The court overruled this motion and found probable cause to bind defendant over to the grand jury. Forty-seven days later an indictment was filed in the court of common pleas. At arraignment defendant pleaded not guilty. At trial defendant again moved to dismiss for failure to be accorded a preliminary hearing within the prescribed period. The court overruled the motion and defendant was subsequently convicted. On appeal, the court of appeals held that although the charge against defendant should have been dismissed by the municipal court at the preliminary hearing, the subsequent indictment "cured" the failure of the state to provide defendant a preliminary hearing within the prescribed period.

By a four to three majority, the Ohio Supreme Court affirmed the judgment of the court of appeals. Three concurring opinions and one dissenting opinion were filed. Justice Paul Brown, concurring, alone agreed with the court of appeals that the subsequent indictment "cured" the failure to provide defendant with a timely preliminary hearing.[105] The remaining six justices stated that the statutory mandate to provide a preliminary hearing within the prescribed period could not be "cured" by an indictment filed outside that period.

Justice Herbert, concurring in the judgment, stated that while the statute mandated that defendant be discharged under the circumstances, the legislature had exceeded its authority in enacting the speedy trial statutes.[106] He felt that whether a particular defendant had been provided a speedy trial was a factual question and thus a matter that should be entrusted to the judiciary.[107] On the facts in *Pugh*, Justice Herbert thought

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103. Under Ohio law, if a nolle prosequi is entered before a jury is sworn, an accused has not been placed in jeopardy and another prosecution for the same offense is permissible. OHIO REV. CODE ANN. § 2941.33 (Page 1975); State v. Sanders, 365 F. Supp. 1251 (S.D. Ohio 1973), *aff'd*, 500 F.2d 1403 (6th Cir.), *cert. denied*, 419 U.S. 1026 (1974).

104. 53 Ohio St. 2d 153, 372 N.E.2d 1351 (1978).

105. *Id.* at 159-60, 372 N.E.2d at 1354 (P. Brown, J., concurring).

106. *Id.* at 156, 372 N.E.2d at 1352 (Herbert, J., concurring).

107. Justice Herbert argued that the legislature had violated the doctrine of separation of powers by enacting the speedy trial statutes. He cited United States v. Howard, 440 F. Supp. 1106 (D.C. Md. 1977), in support of his view. In *Howard*, a federal district court judge held the Federal Speedy Trial Act of 1974 unconstitutional. Although he had already determined that defendants were not entitled to discharge under that Act, Judge Young stated that "[r]egardless of the proper construction of the Speedy Trial Act, its commands cannot be given effect because they are an unconstitutional legislative encroachment on the judiciary." *Id.* at 1109. Judge Platt observed that the federal Speedy Trial Act of 1974 might be saved from unconstitutionality by permitting defendants to waive the statutory time

defendant had been provided a speedy trial and thus he agreed that the court of appeals was correct in refusing to release him.[108]

Justice Celebrezze, in a concurring opinion joined by Justice Locher, reasoned that defendant's entering of a plea to the indictment constituted a waiver of compliance with the preliminary hearing time limitation.[109] This view was specifically rejected by Justice Herbert and the three dissenting justices. The dissenting opinion of Justice William Brown, in which Justice Sweeney and Chief Justice O'Neill concurred, asserted that the language of section 2945.73(A) made dismissal mandatory and that the failure to dismiss thus invalidated the subsequent conviction.[110]

Had defendant refused to plead, a majority of the court, consisting of Justices Celebrezze, Locher, William Brown, Sweeney, and O'Neill, agreed he would have been entitled to discharge; a different majority, consisting of Justices Herbert, William Brown, Sweeney, and O'Neill, believed that the defendant's entering a plea to the indictment did not waive his right to have the charges against him dismissed. Since no single interpretation appears to have majority support, it is difficult to discern the present status of an accused's statutory right to a speedy preliminary hearing. Ironically, the dissenting opinion is most consistent with other decisions of the court holding that the statutes are mandatory and should be strictly construed.[111]

IV. CONCLUSION

The Ohio legislature enacted the speedy trial statutes in 1974 as an attempt to specify and define an imprecise constitutional right. The

limits. Platt, *The Speedy Trial Act of 1974: A Critical Commentary*, 44 BROOKLYN L. REV. 757 (1978). The Ohio Supreme Court has repeatedly held that a defendant can waive his statutory right to a speedy trial. Westlake v. Cougill, 56 Ohio St. 2d 230, 383 N.E.2d 599 (1978); State v. McRae, 55 Ohio St. 2d 149, 378 N.E.2d 476 (1978); State v. McBreen, 54 Ohio St. 2d 315, 376 N.E.2d 593 (1978). Thus, the Ohio statutes satisfy the standard proposed by Judge Platt.

108. In *Pugh*, 41 statutory days (the 11 days defendant spent in jail equals 33 statutory days; added to these are the eight days defendant was out on bond, for a total of 41 statutory days) had elapsed before a determination was made concerning whether sufficient facts existed to warrant holding defendant under arrest until he was bound over to the grand jury. Justice Herbert argued that defendant was not prejudiced by this delay and therefore was denied no right protected by the speedy trial guarantee. Yet the United States Supreme Court had stated that the right to a speedy trial is in part to prevent undue incarceration and to minimize anxiety and concern accompanying public accusation. *See* note 3 and accompanying text *supra*. Certainly the legislature is legitimately attempting to protect an accused from undue incarceration and anxiety when it requires that he be given a prompt preliminary hearing. Furthermore, there appeared to have been no explanation or justification for having required defendant in *Pugh* to wait almost three times the prescribed period before he was given a preliminary hearing.

In his concurring opinion in State v. Wentworth, 54 Ohio St. 2d 171, 375 N.E.2d 424 (1978) (Herbert, J., concurring), Justice Herbert asserted that it was not necessary to rely on speedy trial statutes to protect an accused's constitutional right. In State v. Tope, 53 Ohio St. 2d 250, 374 N.E.2d 152 (1978), in which defendant was discharged because he was not brought to trial until three days beyond the statutory time limit, Justice Herbert dissented, citing his opinion in *Pugh*. *Id.* at 253, 374 N.E.2d at 154.

109. 53 Ohio St. 2d at 156, 372 N.E.2d at 1353 (Celebrezze, J., concurring).

110. *Id.* at 160, 372 N.E.2d at 1355 (W. Brown, J., dissenting).

111. *See* notes 88-89 *supra*.

legislature set specified time limits within which an accused had to be brought to trial and enumerated exceptions that would temporarily extend those limits. Realizing that all contingencies could not be covered, the legislature left the statutes[112] sufficiently general to allow the courts a limited amount of discretion to give temporary continuances.

Decisions of the Ohio Supreme Court interpreting the continuance provision have severely compromised the statute's effectiveness. By finding a continuance if the trial court has "reasonably" set the trial date beyond the statutorily prescribed period,[113] the court is in effect repealing the specified time limits and retreating to the imprecise constitutional standard.

The Ohio Supreme Court has been reluctant to follow the seemingly clear statutory language that mandates discharge of an accused when the state has failed to bring him to trial promptly. Instead, the court looks to whether the legislative purpose behind the enactment of the speedy trial statutes is furthered by such a discharge.[114] In the court's view, the legislative purpose that underlies the statutes is to correct the *judicial process* when it has been at fault in not bringing the accused to trial within the prescribed time limits.[115] This interpretation misconstrues the purpose behind the statutes: to ensure to every *accused* his right to a speedy trial. It may be necessary for the legislature to clarify its purposes by limiting the statutory flexibility that the courts have used to dilute the protections afforded by the speedy trial statutes.

Gary N. Sales

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112. *See* OHIO REV. CODE ANN. § 2945.72(H) (Page Supp. 1978), *quoted at* note 11 *supra*; notes 65-68 and accompanying text *supra*.

113. *See* notes 91-95 and accompanying text *supra*.

114. State v. Ladd, 56 Ohio St. 2d 197, 201, 383 N.E.2d 579, 582 (1978).

115. *Id.* at 200, 383 N.E.2d at 581.